

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000453-MR

VICKIE STONE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CI-005938

CITIFINANCIAL SERVICES, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Appellant, Vickie Stone (Ms. Stone), *pro se*, brings this appeal from an Order of the Jefferson Circuit Court, entered December 23, 2003, enforcing a settlement agreement between Stone and appellee Citifinancial Services, Inc. (Citifinancial). We affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

We review questions of fact under the clearly erroneous standard of Kentucky Rule of Civil Procedure (CR) 52.01; Largent v. Largent, 643 S.W.2d 261, 263 (Ky. 1982). The trial court's application of law, is of course, reviewed *de novo*. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). We conclude that the findings of the trial court are supported by substantial evidence and there was a correct application of law.

The facts are these. Citifinancial owned residential property that was for sale. On May 29, 2003, Ms. Stone offered to purchase the property for \$101,000.00. Citifinancial received the offer document, but either let the offer expire or rejected the offer through their real estate agent. On June 3, 2003, Ms. Stone offered \$131,000.00, contingent upon financing. This offer was ultimately accepted and the parties proceeded to closing.

According to testimony from Ms. Stone's husband, Thomas Stone (Mr. Stone), after the acceptance of the offer for \$131,000.00, he had the property appraised and inspected for termites. A termite inspection dated June 16, 2003, indicated active "termites in a piece of wood three feet from foundation on the outside" and recommended treatment. An additional inspection on June 24, 2003, indicated active "termites in timbers three feet from foundation of house on the outside" and recommended treatment. Mr. Stone testified that the appraiser

would give no value to the house because the house was "infested with termites," but verbally valued the land at \$101,000.00 or \$100,000.00.² Mr. Stone also testified that, through Ms. Stone's real estate agent, he asked Citifinancial to reduce the price or release Ms. Stone from the \$131,000.00 contract. The record is silent as to whether Citifinancial ever received or acted on this request.

Citifinancial's closing agent later contacted Mr. Stone, as attorney-in-fact for Ms. Stone, to select a local closing attorney. Mr. Stone obtained the services of Stephen Porter (Porter). Mr. Stone provided Porter with an offer, not signed by either party, showing a purchase price of \$131,000.00. According to Porter, Mr. Stone explained that the \$131,000.00 price was contingent on obtaining financing, and financing was not approved because the property would not appraise for that amount; therefore, Porter testified that Mr. Stone said he was trying to get the property for \$101,000.00. The record indicates that Mr. Stone could pay the lower amount without obtaining financing.

Citifinancial's closing agent sent closing documents to Porter and the Stones. The closing documents were signed by Citifinancial and reflected a purchase price of \$101,000.00. At the closing on June 30, 2003, attended only by Porter and Mr.

² No appraisal document appears in the record.

Stone (for Ms. Stone), the closing documents were signed and the \$101,000.00 tendered. Ms. Stone obtained the keys and moved in.

Citifinancial's closing agent called Porter later the day of the closing and advised that the amount on the closing documents was incorrect as the closing agent had mistakenly sent pages from the \$101,000.00 offer and the signatures from the \$131,000.00 offer.

Citifinancial posted the property as theirs and changed the locks. On July 9, 2003, Ms. Stone filed a declaration of rights and trespass action against Citifinancial, asking to be restored as owner of the property. Ms. Stone also asked for a temporary injunction. Citifinancial counterclaimed for \$30,000.00 for breach of contract, and reformation or rescission of the deed. Following a hearing in which Porter and Mr. Stone testified, on September 2, 2003, the circuit court issued an order denying the temporary injunction, finding no contract for \$131,000.00 (as the offer had expired before Citifinancial accepted it), and restoring the property to Citifinancial and the \$101,000.00 to the Ms. Stone.

The parties entered into settlement negotiations. On September 13, 2003, Ms. Stone's attorney sent a fax to Citifinancial which stated:

Have authority from Mr. & Mrs. Stone to transfer \$30,000 from our escrow account to Citifinancial thru your office. Will send

by overnight mail tomorrow. Have sent fax to Stephen Porter asking that he send \$101,000 directly to you.

The next item in the record is correspondence from September 17, 2003, where Ms. Stone's attorney informed Citifinancial that she was willing to comply with the court's order and return the property to Citifinancial but first needed \$60,000.00 from Citifinancial for improvements made.³ Citifinancial countered with a fax indicating that the parties already had an agreed settlement, based on the September 10, 2003, fax from Ms. Stone's attorney. Ms. Stone countered with a fax withdrawing the "settlement offer," contending that the parties had agreed to settle only if the settlement included language explaining that the additional payment was being made pursuant to order of the court in order to preserve claims for liquidated damages against third parties (Citifinancial's closing agent).

On September 25, 2003, Citifinancial filed a motion to enforce the settlement agreement. After a hearing, on December 23, 2003, the circuit court found that the September 10, 2003, fax memorialized the settlement agreement and denied Ms. Stone's motion to amend the complaint to add a claim for \$60,000.00, stating:

The Court is further satisfied that [Ms. Stone], if [she] added \$60,000.00 in improvements to the premises, also presumed

³ The record does not contain any documentation substantiating this amount.

there was settlement. Thus, it appears that [Citifinancial] stands ready, willing, and able to transfer title upon the payment of \$131,000.00 and [Ms. Stone] has agreed to pay same for the property.

Ultimately, then, according to the settlement, upon transfer of the initial \$101,000.00 and payment of an additional \$30,000.00 to Citifinancial, Ms. Stone is entitled to the property. This appeal followed.

Before us, Ms. Stone argues that the circuit court's finding that there was no agreement to sell the property for \$101,000.00 was clearly erroneous and further, that there was no settlement. Having reviewed the record, we disagree and affirm the circuit court.

The circuit court initially ordered the parties restored to their original status (Ms. Stone to be refunded the \$101,000.00, and Citifinancial to receive the property). In so doing, the circuit court concluded that no contract at \$131,000.00 existed because it was undisputed that the offer to purchase at \$131,000.00 expired before acceptance. The circuit court thereafter found no evidence to support a basis for an agreement to use \$101,000.00 as the purchase price, the issue disputed herein by Ms. Stone. Mr. Stone testified that the contracted purchase price was \$131,000.00, but he believed (without any other contact or documentation from Citifinancial except for the closing documents) that when the closing

documents reflected a purchase price of \$101,000.00 that Citifinancial had reduced the purchase price to reflect the appraisal value due to the termite issue. There is no evidence in the record from Citifinancial that it ever agreed to a purchase price of \$101,000.00. In fact, Citifinancial tried to correct the error as soon as it was discovered. As stated in Smith v. Hilliard, 408 S.W.2d 440, 442 (Ky. 1966):

At most, there was no meeting of the minds, no contract, but a bona fide misunderstanding. In such a case the parties are entitled to restitution.

As such, the circuit court's conclusion that there was no agreement is supported by the record and is not an abuse of discretion.

After the order restoring the parties to their original status, the circuit court was again asked to intervene in the manner of enforcing a settlement agreement. The circuit court correctly concluded that an agreement existed as evidenced by the fax document indicating that Ms. Stone authorized her attorney to transfer the additional \$30,000.00 to Citifinancial. The court was, of course, acting within its power to enforce such an agreement. Clark v. Burden, 917 S.W.2d 574 (Ky. 1996). Perforce we can find no abuse of discretion by the court in upholding the settlement.

For the foregoing reasons, the Order of the Jefferson
Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Vickie Stone, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Shea W. Conley
Lexington, Kentucky